

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0067

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL FITZGERALD BROOKS,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of the Fourth Judicial District of the State of
Montana, in and for the County of Missoula,
The Honorable Ed McLean, District Judge, Presiding

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STATEMENT OF THE ISSUES

Under Article II, Section 25 of the Montana Constitution, as applied to Mr. Brooks, did the District Court err when applying the sentence enhancement of persistent felony offender when Mr. Brooks was also subject to the sentence enhancement of felony driving under the influence of alcohol?

Under § 46-13-108(3), MCA, did the District Court err when it did not hold a hearing to inquire into whether the allegations of the persistent felony offender notice were true when Mr. Brooks objected to the allegations contained in the notice of seeking persistent felony offender status?

STATEMENT OF THE CASE

On October 2, 2007, the Defendant, Daniel Fitzgerald Brooks, was charged with Driving a Motor Vehicle while Under the Influence of Alcohol or Drugs, 4th Offense, a Felony, in violation of § 61-8-401(1)(a), MCA (hereinafter “Felony DUI”), Operating a Motor Vehicle the Wrong Way on a One Way Street, a Misdemeanor, in violation of § 61-8-327, MCA, and Failure to Carry Proof of Liability Insurance, 3rd Offense, a Misdemeanor, in violation of § 61-6-302, MCA.

At the Status Conference and Sentencing Hearing of December 2, 2009 and December 16, 2009, respectively, Mr. Brooks argued that the District Court should vacate the persistent felony offender (hereinafter “PFO”) designation and sentence him to thirteen months in the Department of Corrections and two years suspended,

with credit for time served, pursuant to the Felony DUI enhancement because double jeopardy prohibited sentencing him as a PFO.

Mr. Brooks also argued that the PFO designation was improper because his prior felony conviction was an infirm conviction that could not be used to enhance a subsequent felony. Judge Ed McLean of the Fourth Judicial District Court sentenced Mr. Brooks under the PFO designation to ten years at Montana State Prison with five years suspended. From that imposition of sentence, Mr. Brooks appeals.

STATEMENT OF THE FACTS

The Felony DUI resulted from an incident that occurred on or about September 14, 2007. *See generally State v. Brooks*, Cause No. DC-07-377, Affidavit and Motion for Leave to File Information (Mont. 4th Jud. Dist. Ct. October 2, 2007). The State notified Mr. Brooks in the Omnibus Hearing Memorandum of its intent to seek sentencing of Mr. Brooks as a PFO because of his prior conviction on July 1, 2005 in Flathead County District Court, Montana, of Assault with a Weapon, Cause No. DC-03-047. *See State v. Brooks*, Cause No. DC-07-377, Omnibus Hearing Memorandum at 5 (Mont. 4th Jud. Dist. Ct. Nov. 28, 2007). On February 11, 2008, a jury found Mr. Brooks guilty of Felony DUI. *See generally State v. Brooks*, Cause No. DC-07-377, Verdict (Mont. 4th Jud. Dist. Ct. Feb. 11, 2008). On April 2, 2008, the District Court sentenced Mr. Brooks.

See generally State v. Brooks, Cause No. DC-07-377, Judgment (Mont. 4th Jud. Dist. Ct. Apr. 2, 2008). On October 20, 2009, this Court remanded this matter to the District Court “to clarify and/or modify Brooks’ sentence to comply with the law.” *Brooks v. Mahoney*, OP 09-0420, Order at 3 (Mont. Sup. Ct. Oct. 20, 2009). On December 2, 2009, the District Court held a status conference on this matter wherein Mr. Brooks argued for himself. *See State v. Brooks*, Cause No. DC-07-377, Transcript of Proceedings at pp. 5-7 (Mont. 4th Jud. Dist. Ct. Dec. 2 and 16, 2009) (hereinafter “Tr.”) (Appendix A). On December 10, 2009, Mr. Brooks filed a *pro se* Memorandum in Support of Resentencing Recommendation. *See Tr.* at pp. 5-7; *see generally State v. Brooks*, Cause No. DC-07-377, Memorandum in Support of Resentencing Recommendation (Mont. 4th Jud. Dist. Ct. Dec. 10, 2009) (hereinafter “Memorandum”) (Appendix B). In the Memorandum and in open court, Mr. Brooks argued: (1) double jeopardy prohibits sentencing him to multiple punishments for the same offense; and (2) that the Flathead felony conviction could not be used for the PFO enhancement. *See Tr.* at pp. 9-10, 12-14, 17, 30-31; Memorandum at 2-3, 6-7; *see also State v. Brooks*, Cause No. DC-07-377, Reply Brief at 2 (Mont. 4th Jud. Dist. Ct. Dec. 10, 2009) (hereinafter “Reply Brief”) (Appendix C). Mr. Brooks requested that the District Court vacate the PFO designation, and sentence him to thirteen months in the Department of Corrections, with two years suspended. *See Tr.* at pp. 6, 8; Memorandum at 2, 8. On December

16, 2009, the District Court sentenced Mr. Brooks as a PFO to ten years at Montana State Prison, with five years suspended. *See* Tr. at pp. 27, 30; *State v. Brooks*, Cause No. DC-07-377, Judgment at 2 (Mont. 4th Jud. Dist. Ct. Dec. 17, 2009) (hereinafter “Judgment”) (Appendix D).

SUMMARY OF ARGUMENT

Article II, Section 25 of the Montana Constitution prohibits defendants from being sentenced to multiple punishments for the same offense. This Court has broadly applied this protection against double jeopardy to prohibit application of sentencing enhancements that are derived from the same elements. Applying these constitutional protections and Montana case law to Mr. Brooks, the District Court could not apply the PFO sentence enhancement because both the Felony DUI and PFO enhancements rely on the element of prior convictions. Mr. Brooks could only be sentenced under the Felony DUI enhancement.

In the alternative, § 46-13-108(3), MCA mandates that if Mr. Brooks objects to the allegations contained in the notice to seek PFO designation, the District Court must hold a hearing to determine whether the allegations contained in the notice are true. Mr. Brooks objected to the PFO designation prior to the December 16, 2009 sentencing hearing, but the District Court did not conduct a hearing on the whether the allegations contained in the notice to seek PFO were true.

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ARGUMENT

I. Standard of Review

This Court has explained that review of a “sentence involves a legal question that we review *de novo* to determine whether the District Court’s interpretation of the law is correct.” *State v. Guillaume*, 1999 MT 29, ¶ 7, 293 Mont. 224, 975 P.2d 312 (1999) (citing cases).

II. Double jeopardy prohibits punishing a defendant twice when the sentencing enhancements rely on the same element.

Criminal defendants cannot be punished twice for the same offence. The double jeopardy provision of Article II, Section 25 of the Montana Constitution mandates that: “No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.” This Court articulately explained “whether multiple punishments have been imposed in violation of a defendant’s fundamental right to be free from double jeopardy brings into question the fundamental fairness of the proceedings and the integrity of the judicial process.” *State v. Whitehorn*, 2002 MT 54, ¶ 39, 309 Mont 63, 50 P.3d 121 (2002) (citing cases). The double jeopardy provision “protects defendants from both multiple prosecutions for offenses arising out of the same transaction, and multiple punishments imposed at a single prosecution for the same offense.” *Guillaume* ¶ 8 (citing cases). “Article II, Section 25 of the Montana Constitution provides greater protection from double jeopardy than is provided by the United States Constitution.” *Id.* ¶ 13; *see also id.*

¶ 16 (determining that “the Montana Constitution affords greater protection against multiple punishments for the same offense than does the Fifth Amendment to the United States Constitution”).

In *Guillaume*, the District Court sentenced the defendant to ten years in prison for felony assault, and enhanced his sentence by another five years pursuant to the weapon enhancement statute. *Id.* ¶ 9. Both the felony assault charge and the weapon enhancement statute applied because the defendant used a weapon in the commission of the crime. *Id.* This Court concluded that the lower court’s sentence punished the defendant twice for the element of using a weapon: once when increasing the charge from a misdemeanor to felony; and second with application of the weapons enhancement. *Guillaume* ¶ 18. Guided by the “legal and moral concept that no person should suffer twice for a single act,” this Court concluded that “application of the weapon enhancement statute to felony convictions where the underlying offense requires proof of use of a weapon violates the double jeopardy provision of Article II, Section 25 of the Montana Constitution.” *Id.* ¶¶ 16, 17.

The same analysis of *Guillaume* applies to this matter. Mr. Brooks was charged with driving under the influence of alcohol (“DUI”), with two sentencing enhancements of Felony DUI and PFO.

The DUI statute applicable here explains that: “It is unlawful and punishable ... for a person who is under the influence of ... alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public” § 61-8-401(1)(a), MCA. Typically, DUI charges are sentenced as misdemeanors. However, defendants may be subject to a sentencing enhancement if the defendant has “three or more *prior convictions* under 45-5-104, 45-5-205, 61-8-401, or 61-8-406... .” § 61-8-731, MCA (emphasis added). This enhancement elevates the sentencing of DUI from a misdemeanor to a felony by increasing the minimum incarceration period to more than one year. *Compare* § 61-8-714, MCA *with* § 61-8-731, MCA.

The PFO statute defines a “persistent felony offender” as “an offender who has *previously been convicted* of a felony” § 46-18-501, MCA (emphasis added). If this statute applies, the PFO “shall be imprisoned in the state prison for a term not less than 5 years or more than 100 years or shall be fined an amount not to exceed \$50,000.” § 46-18-502(1), MCA. The Felony DUI and PFO sentence enhancements both require satisfaction of a prior conviction element.

The Felony DUI and PFO designations twice enhanced Mr. Brooks’ sentence for having a prior conviction. This sentencing subjected Mr. Brooks to multiple punishments simply because the State classifies him as a recidivist. Both enhancements independently punish the defendant for prior acts. However, when

taken together, the enhancements both punish Mr. Brooks for recidivism in violation of the double jeopardy protections. As applied, both the Felony DUI and PFO enhancements subject Mr. Brooks to not just double punishments, but multiple punishments for the same element.

Because the District Court enhanced Mr. Brooks' sentence twice due to the prior conviction element, this matter is analogous to *Guillaume* and the protections outlined in *Guillaume* must be extended to this matter. In *Guillaume*, the defendant was impermissibly sentenced twice for use of a weapon. *See Guillaume* ¶¶ 16, 18. Here, the District Court punished Mr. Brooks twice for having prior convictions. The sentence in both *Guillaume* and here were enhanced based upon the same element. Therefore, just as in *Guillaume*, this Court should determine that application of the PFO statute impermissibly violates the protections against double jeopardy when the underlying offense is already enhanced because of prior convictions.

The State subjected Mr. Brooks to the Felony DUI enhancement solely because of his prior convictions. The underlying acts that violated the DUI statute did not subject Mr. Brooks to Felony DUI and were not relevant to the facts presented to find him guilty of DUI. The Felony DUI enhancement was only taken into account at sentencing. The Felony DUI enhancement was solely based upon a prior conviction.

Again, the State subjected Mr. Brooks to the PFO enhancement solely because of his prior convictions. The underlying acts that violated the DUI statute did not subject Mr. Brooks to the PFO enhancement and were not relevant to the facts presented to find him guilty of DUI. The PFO enhancement was only taken into account at sentencing. The PFO enhancement was solely based upon prior convictions.

Application of the Felony DUI and PFO enhancements were not based on the acts relevant to the underlying charge, but based on Mr. Brooks' prior offenses. Because of the reliance on the same element, application of the PFO enhancement, as applied to this matter, violates the Montana Constitution's protections against double jeopardy. Only because Mr. Brooks' matter was enhanced to Felony DUI because of his prior convictions, did the PFO enhancement apply. These multiple enhancements violate the double jeopardy protections.

The State may argue that *State v. Robinson* permissibly allows Mr. Brooks to be sentenced under the PFO enhancement. This argument lacks merit. In *Robinson*, this Court determined that the "sentencing statute for persistent felony offenders replaces the maximum sentence for an offense, rather than creating a sentence that is imposed in addition to the offense." *State v. Robinson*, 2008 MT 34, ¶ 16, 341 Mont. 300, 177 P.3d 488 (2008). Under the limited scope of *Robinson*, Mr. Brooks' sentence is facially valid. However, the *Robinson* court

failed to address the double jeopardy considerations at issue here and dealt with charges where the PFO statute properly enhanced the sentence because the charge was not coupled with another enhancement for the same element. *Id.* ¶¶ 16-18. Therefore, the *Robinson* logic does not apply to this matter.

In *Guillaume*, this Court was acutely sensitive to engaging in a semantics debate about whether application of the weapon enhancement statute imposed only one punishment, rather than two, concluding “to accept this argument, we would in effect strip double jeopardy of all meaning.” *Guillaume* ¶ 22. To allow Mr. Brooks’ sentence to be enhanced twice because of prior convictions would also “in effect strip double jeopardy of all meaning.” Therefore, this Court should reverse the sentence imposed by the District Court and require that Mr. Brooks be sentenced only under the Felony DUI enhancement.

III. In the alternative, § 46-13-108(3), MCA mandates that when the defendant challenges a persistent felony offender designation, the District Court shall have a hearing on that status.

If the defendant objects to the allegations contained in the notice to seek PFO designation, “the judge shall conduct a hearing to determine if the allegations in the notice are true.” § 46-13-108(3), MCA. Mr. Brooks objected to the PFO notice in his *pro se* Memorandum in Support of Resentencing Recommendation explaining:

That the persistent felony offender enhancement is not legal.
Defendant’s previous felony sentence used to enable this court to

charge the Defendant to § 46-18-502 was not a constitutionally valid charge. In Flathead County cause no. DC-03-047 the Defendant, Daniel F. Brooks, was without counsel in the critical stages of the prosecution.

Memorandum at 2. Mr. Brooks' objection to the PFO designation mandated that the District Court examine the validity and applicability of the Flathead offense. *See* § 46-13-108(3), MCA. Further, in the event that Mr. Brooks' objection has merit, the practical effect would be to significantly decrease his sentence. In addition to the mandatory language of the § 46-13-108(3), MCA, justice and fairness dictate that Mr. Brooks be afforded the opportunity for the District Court to substantively examine the truth of the PFO notice.

The State may argue that Mr. Brooks did not object in the lower court proceedings; and therefore, the judge was not required to hold a hearing on this issue. This argument lacks merit. The United States Supreme Court has explained that "pro se pleadings are to be given a liberal construction."

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 164 (1984). Mr. Brooks effectively represented himself at resentencing. *See* Tr. at 5-7, 12, 17. Mr. Brooks acted as a *pro se* litigant at resentencing. While he may not have used the specific term "object" or "objection," Mr. Brooks intended to challenge the validity of the PFO designation and the allegations of the PFO notice. Mr. Brooks alleges that the Flathead offense was "not a

constitutionally valid charge” because he was not afforded his right to counsel. Memorandum at 2. Even if Mr. Brooks’ intent was unclear, liberal construction of the Memorandum dictates that § 46-13-108(3), MCA requires the Judge to conduct a hearing to determine the validity of the PFO notice. Therefore, this Court should reverse the District Court’s sentence and order the District Court to conduct a hearing on the validity of the PFO notice.

CONCLUSION

This Court has broadly applied the Montana Constitution’s protections against double jeopardy. The legal and moral considerations previously applied by this Court should be extended to Mr. Brooks because double jeopardy prohibits enhancing his sentence twice as a Felony DUI and PFO because they both rely on an element of prior convictions. Therefore, this Court should reverse the sentence of the District Court and instruct the District Court to sentence Mr. Brooks pursuant to Felony DUI.

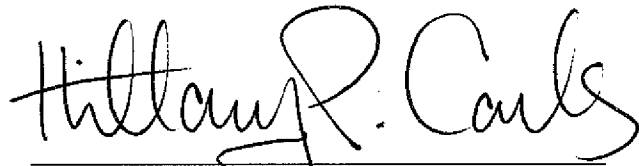
In the alternative, Mr. Brooks should be afforded the opportunity to have a substantive hearing on the truth of the allegations contained in the PFO notice. Section 46-13-108(3), MCA mandates that the judge hold a hearing once Mr. Brooks objected to the PFO notice. Given the significantly increased consequences of the PFO enhancement, Mr. Brooks must be given the ability to

examine the PFO notice allegations prior to having his sentence enhanced.

Therefore, in the alternative, this Court should reverse the sentence of the District Court and order the District Court to conduct a hearing to determine the truth of the allegations contained in the PFO notice.

Respectfully submitted this 26th day of April, 2010.

ANGEL, COIL & BARTLETT



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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the above and foregoing were duly served upon each of the following parties or their counsel, by first class mail, on the 26th day of April, 2010, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except; and the word count calculated by Microsoft Word 2008, is not more than 10,000 words excluding certificate of service and certificate of compliance.

Dated this 26th day of April, 2010.

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